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VIA ELECTRONIC MAIL

Country of Origin Labeling Program
Agricultural Marketing Service
U.S. Department of Agriculture
Stop 0249
Room 2092-S
1400 Independence Avenue, S.W.
Washington, D.C. 20250-0249

Dear Sir or Madame:

On behalf of Meat and Livestock Australia ("MLA"), I am writing to comment on the U.S. Department of Agriculture ("USDA") Agricultural Marketing Service ("AMS") *Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Pork, Lamb, Fish, Perishable Agricultural Commodities, and Peanuts* ("guidelines"), as published in the October 11, 2002 *Federal Register*. MLA is an organization of Australian producers in the cattle, sheep, and goat industries that also provides services to other industry sectors, including meat processors and live animal exporters. Our members export significant amounts of beef and lamb to the United States and worldwide.

I. Introduction

MLA has consistently opposed the adoption of a country of origin labeling provision as a threat to the continued progress of recent years in liberalizing market access for agricultural products. We continue to regard the labeling provision as a negative development which needlessly interferes with the economic efficiencies of the U.S. domestic meat market, disadvantages U.S. consumers, complicates U.S. agricultural trade policy, and likely violates U.S. obligations under the WTO because it discriminates against imported meat.

The statute and the voluntary guidelines are particularly troubling because of the complex regime they impose on labeling for ground beef sold at retail -- the final destination of a significant portion of Australia's beef exports to the United States. Ground beef sold in the U.S. retail market is almost *always* a combination of beef trimmings from two or more sources of different fat content that are blended to meet consumer demand for specific qualities of taste, cost, or leanness. Forcing each U.S. meat processor, distributor, and retailer to account by weight for the varying input of up to thousands of grindings per year raises the prospect of an elaborate tracking and recordkeeping system that can only have the deleterious effect of adding

to the cost of each element of the distribution chain, raising prices for consumers, and interfering with existing market efficiencies.

MLA hopes the labeling provision of the Farm Security and Rural Investment Act of 2002 will be repealed before mandatory implementation must occur. Nonetheless, MLA recognizes that USDA is obligated in the meantime to implement the new law as enacted by Congress. Therefore, we would like to share some observations on the anticipated impact of mandatory country of origin labeling from our vantage point as suppliers to both U.S. and world markets.

II. Background

Proponents of labeling maintain that U.S. consumers, if informed at the point of retail sale of the country of origin of a particular package of meat, would choose products of "U.S.-origin" more often than not.[1] Such a view strongly implies that U.S. meat and imported meat are always in a contest that only one of them can "win." However, this premise is a completely inaccurate assessment of the relationship between the type of Australian beef imported into the United States and its domestic "counterpart."

Australian and U.S. manufacturing beef are actually different and complementary, not competitive. In fact, a significant portion of the U.S. beef industry depends on Australian manufacturing beef in order to produce marketable ground beef. The proportion of manufacturing beef among beef imports from Australia has averaged over 90 percent over the last five years.[2]

Australian beef imports, which currently represent only four percent of total U.S. annual beef production, consist predominantly of lean manufacturing beef trimmings, a product that is 90 percent lean because it derives from Australian grass-fed cattle. Such product is commonly referred to in the industry as "90's," "lean 90's," or "90CL."

By contrast, the majority of U.S. retail weight beef production is destined for whole muscle cuts, with manufacturing beef a much smaller part of production. Moreover, domestically produced manufacturing beef has a much higher fat content -- in general, around 50 percent fat/50 percent lean -- because it derives from cattle fed on high energy feed rations in feedlots. Such product is commonly referred to in the industry as "beef 50's," "50's" or "50CL."

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[1] *See, e.g.*, 147 *Cong. Rec*. S10,938 (daily ed. Dec. 13, 2001) (statement of Sen. Johnson: "I think this is helpful to a lot of American agricultural producers because I happen to believe a lot of Americans**,** if they have the choice, will choose an American product."); 148 *Cong. Rec*. H1539 (daily ed. Apr. 24, 2002) (statement of Rep. Pomeroy: "American producers . . . . can benefit . . . only if consumers are able to differentiate between products of U.S. origin and products from overseas."); letter from Iowa Farm Bureau Federation to Sen. Harkin, *reprinted at* 148 *Cong. Rec*. S3929 (daily ed. May 7, 2002) (stating, "[t]his [labeling] provision will ensure that consumers have an opportunity to choose between domestically produced beef . . . and [products] produced overseas . . . . We believe U.S**.** consumers will choose to purchase products produced by our farmers if this information is made available to them.").

[2] Australia Dep't of Agric., Fisheries & Forestry (export data).

Consumers will not purchase ground beef that has a 50 percent fat content. Therefore, the higher fat trimmings must be mixed with leaner trimmings to appeal to retail consumers.[3]

When frozen lean manufacturing (or "processing") beef is imported from Australia, it is mixed in the United States with the typically higher-fat U.S. domestic trimmings to produce ground beef at particular "lean points." For example, if the desired lean point is 70 percent, then equal volumes of imported 90's and domestic 50's would be required. Higher lean points require proportionately different combinations of the imported and domestic trimmings. This process makes clear that the Australian beef industry adds value to the U.S. beef industry. By maximizing the utilization of domestic 50's through blending with the 90's that Australia produces, such complementarity allocates U.S. domestic and imported supplies to their most appropriate uses. Both the imported and the domestic product "win."

Unfortunately, the statutory labeling provision and the anticipated mandatory regulations (if based on the existing voluntary guidelines) will disrupt these efficiencies by disadvantaging the imported commodity.

III. The Statute and the Voluntary Guidelines Impose Greater Burdens on the Use of Imported Meat

A. The Statute

Subtitle D of the Farm Security and Rural Investment Act of 2002 ("the Act") requires the retailer of a "covered commodity" to inform consumers at the final point of sale of the country of origin of that commodity through the use of any one of the "visible signs" specified in the Act, including a label. The covered commodities include muscle cuts of beef, lamb, and pork – but not poultry – and ground beef, ground lamb, and ground pork -- but not ground poultry. Covered commodities do not include "an ingredient in a processed food item."

Facially, the language of the statute purports to afford equal treatment to domestic and imported commodities, a difference from similar measures introduced in previous Congresses that expressly targeted imported meat.[4] Nonetheless, MLA believes that the underlying purpose of labeling proposals has always been to disadvantage imported meat and that the existing statutory provision will have that effect. By including ground beef, which always is a blended product and nearly always combines foreign and domestic trimmings, the statute lays the foundation for a regulatory scheme that will inevitably impose a heavier burden on processors and retailers who use imported manufacturing beef in their ground beef blends.

Once frozen manufacturing beef from Australia reaches the United States, it is handled by "further processors" ("grinders") who grind the Australian beef and blend it with fresh domestic and/or other imported trimmings and send the resulting product to a retailer, usually in individual packages that are "case ready" (*i.e.*, packaged for retail sale). A grinder using

[3] The United States also produces lean manufacturing beef that is, in general, around 90 percent lean, but in much smaller quantities relative to the beef 50's.

[4] *See, e.g.*, H.R. 1371, 105th Congress (1997); S. 617, 105th Congress (1997); H.R. 222, 106th Congress (1999); S. 242, 106th Congress (1999); S. 251, 106th Congress (1999).

Australian beef will usually purchase the beef from importers. However, some grinders have their own importing divisions and import the product from Australia directly. In either case, the grinder always blends the Australian beef with U.S. domestic beef and/or beef from other countries as well. The decision as to the particular blend of beef that fills an order from a retailer is generally made by the grinder but usually conforms to specifications set by the retailer -- particularly for leanness, as described in Section II.

The grinder using Australian beef chooses the particular blend of trimmings from those available to it at the time that will meet the specifications. Although the final product of such a process always contains beef from Australia and the United States, it may also contain beef from at least one other country, and the other country sources that are used to fill an order for ground beef will vary each time a grinder fills an order. The difficulty of tracking the identity of each set of trimmings used for each order of ground beef in order to meet the labeling requirement is readily apparent since a grinder may handle thousands of pounds of trimmings to fill orders for large retail chains, and fill hundreds of orders each year.

This conclusion is supported by a General Accounting Office ("GAO") report published in 2000 which, with respect to the processing of ground beef, states:

> Processors would face the challenge of maintaining detailed records to track a number of possible different countries of origin in their hamburger supply and to maintain accurate label information. And, depending on the requirements in implementing regulations, the complexity and associated costs could be increased if processors also had to track the relative proportion of meat from different sources in each production run of ground beef. Processors might also need new labels and/or labeling equipment, redesigned packaging, or some other way of indicating the country of origin of the meat and meat products.[5]

The GAO report also underscored similar problems for retail outlets that grind their own beef:

> Retail grocery stores perform many of the same activities as meat processors and would have the same types of compliance burdens. That is, retail grocery stores receive boxes of large cuts of meat, which their meat departments cut up and repackage into smaller retail cuts; the stores also grind the trimmings into hamburger meat. On our visit to a typical store in a large grocery chain, we observed that space was limited; the single butcher on duty would prepare several packages of one cut of meat, such as chuck roast, followed by several packages of another cut, such as strip steak. We also observed that fat trimmings from various cutting operations were put into a single receptacle and subsequently ground together into hamburger meat. Segregating imported meats would be difficult under these space and labor constraints. In addition, many grocery stores and butcher shops make their own sausage and meat loaf mix.[6]

[5] Gen. Accounting Office, *Beef and Lamb: Implications of Labeling by Country of Origin* (Jan. 2000), at 13.

[6] *Id.* at 14.

MLA agrees with GAO that the recordkeeping requirements for ground meat imposed by the law will necessarily be more burdensome for ground meat that contains imported ingredients (as it nearly always does) than for meat that is wholly U.S. origin.

However, the statute appears to disadvantage *all* imported meat. It provides for an "audit verification system" pursuant to which USDA "may require that any person that prepares, stores, handles, or distributes a covered commodity for retail sale maintain a verifiable recordkeeping audit trail that will permit [USDA] to verify compliance with this subtitle . . . . " By virtue of the fact that imported meat, by its nature, is likely to have passed through more handling stages than domestic product by the time it reaches the point of final U.S. retail sale (*i.e.*, by passing through at least two countries, and through handling by ranchers, exporters, importers, processors, distributors, etc.), imported product will require a longer audit trail that demands more, and potentially more detailed, recordkeeping.

Although the statute provides that imposition by USDA of audit trail recordkeeping is discretionary, MLA believes that mandatory recordkeeping is inevitable either because USDA will require it or because the market will impose it as each participant in the distribution chain demands assurances from its supplier as to the origin of each component of a blend. USDA's November 21 *Notice of Request for Emergency Approval of a New Information Collection* presupposes that all possible market participants will engage in such recordkeeping.[7]

B. The Voluntary Guidelines

USDA's voluntary guidelines demonstrate that the intent to disadvantage imported meat has already taken effect. In a section of the introduction to the guidelines entitled, "Defining Country of Origin for Blended or Mixed Products," the guidelines provide "that the applicable country of origin labeling for each raw material source (as defined in the guidelines) must be reflected in the labeling of the mixed or blended retail item by order of prominence by weight."[8] Given the usual commercial method of processing ground beef through the use of trimmings from many and varied sources, as described above, MLA believes that the guidelines have fulfilled GAO's prediction that "the complexity and associated costs [of labeling] could be increased if processors also had to track the relative proportion of meat from different sources in each production run of ground beef."[9] The apparent failure of U.S. processors, distributors, and retailers to adopt the voluntary guidelines to date underscores the complexity of the guidelines and the inherent cost of implementing them.

Under mandatory regulations based on the voluntary guidelines, the ability to report each component in order of weight would require taking additional steps to segregate the trimmings into separate sets according to the country of origin of the cuts from which they derived so that

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[7] Dep't of Agric., Agric. Mkt'g Serv., *Notice of Request for Emergency Approval of a New Info. Collection*, 67 *Fed. Reg*. 70,205 (Nov. 21, 2002).

[8] The guidelines define this term as "those that contain one or more covered commodities from one or more countries." *See* Dep't of Agric., Agric. Mkt'g Serv., *Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agric. Commodities, and Peanuts Under the Authority of the Agric. Mkt'g Act of 1946*, 67 *Fed. Reg.* 63,367, at 63,370 (Oct. 11, 2002).

[9] Gen. Accounting Office, *supra* note 5, at 13.

the weight of each segregated portion can be calculated prior to their being combined into the finished blend. Such steps will require of each processor (including retailers who process their own ground beef) the dedication of additional time and space for segregating, and additional effort to assure that each component is properly refrigerated in its segregated form, until blended. All of these steps mean added cost.

In further support of the argument that the guidelines impose a heavier burden on imported product, we note with particular interest the language in section H.3 of the guidelines (recordkeeping for blended products):

> E. Records for domestically produced and/or processed products must clearly identify the location of the growers and production facilities. When similar covered commodities may be present from more than one country or different production regimes, a verifiable segregation plan must be in place. *For imported commodities, records must provide clear product tracking from the port of entry into the United States* [emphasis added].[10]

According to this language, records for domestic product must identify only the grower and production facility. By contrast, records for imported product must account for *every* step in the commodity's existence after entering the United States. If such a requirement survives in the mandatory regulation, the recordkeeping for imported product will clearly be more burdensome than for domestic product and will therefore be clearly discriminatory against the foreign product. However, some of this burden could be lifted by recognizing blended ground beef as an exempt processed food item under the Act.

C. Another Flaw in the Guidelines is the Failure to Recognize Blended Ground Beef as a "Processed" Food Item Under the Statute.

Some of the compliance burdens described above that will negatively affect U.S. processors, distributors, and retailers could be mitigated by treating as a processed food, exempt from the statute,[11] ground beef which consists of a blend of beef from more than one country and that is ground and blended in the U.S. Since the Act itself does not define "processed," it gives USDA the flexibility to make this decision on its own.

MLA does not agree with the restrictive definition of "processed" that USDA has incorporated into the voluntary guidelines because it excludes such blends. Several U.S. statutes take a broader and more reasonable approach and serve as ample precedent for treating as a processed food item the blended ground beef that we have described. MLA encourages USDA to reconsider its decision in the voluntary guidelines and amend the definition in accord with one of the definitions set forth below.

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[10] Dep't of Agric., *supra* note 8, at 63,375.

[11] Subtitle D of the Act provides that "covered commodity" does not include ground beef if "[it] is an ingredient in a processed food item."

1. Additional U.S. Note 1(a) to Chapter 2 ("Meat") of the Harmonized Tariff Schedule of the United States ("HTSUS") 2002 states, "[t]he term 'processed' covers meats which have been *ground* . . . . " [emphasis added]. Since the HTSUS already treats *all* ground beef as processed, it would not be unreasonable to treat one segment of ground beef that is sold at retail -- the ground beef that is a blend of beef from more than one country -- as a processed product under the Act.

2. USDA regulations at 7 C.F.R. § 205.2, issued pursuant to the Organic Foods Production Act, define "processing" as "[c]ooking, baking, curing, heating, drying, *mixing*, *grinding* . . . or *otherwise enclosing food in a container*" [emphasis added]. This provision appears to provide a reasonable precedent for treating a mix of ground beef from various country sources as a processed item, and its applicability is reinforced to the extent that a grinder in the U.S. encloses the ground beef in a container when the grinder packages the meat as case-ready prior to delivery to the retail point-of-sale.

3. The U.S. Food and Drug Administration's ("FDA's") *Antimicrobial Food Additives-Guidance*, issued in 1999, includes a definition of "processed food" that was reached through consultations between FDA and the U.S. Environmental Protection Agency ("EPA") in connection with defining the respective jurisdictions of these agencies over the use of microbials in processed food. The *Guidance* states, "FDA and EPA have agreed that the following activities constitute processing and that *any* food subjected to these activities becomes a 'processed food' . . . : canning, freezing . . . *grinding* [or] *chopping* . . . ." [emphasis added].[12]

If the mandatory regulations do not define processed food to accommodate the practice of the meat industry of "processing" ground beef from multiple and varied sources of trimmings, the inevitable effect will be to disproportionately burden imported beef and, as a result, to encourage processors and retailers to switch to all-domestic sources, a development which, as discussed in Section V, has the potential for disrupting existing market efficiencies in the domestic meat industry as well as exposing the United States to a WTO challenge, as discussed more fully in Section VI.

IV. The Statute Unfairly Exempts Poultry

While the distribution, processing, and retailing of red meat must bear a heavy burden under the statute, no comparable burden is imposed on poultry. In fact, there is no burden at all on poultry under the Act, because poultry is not included as a covered commodity. Such an exemption for the poultry industry should be of concern because it is a departure from existing policies in other agriculture and food statutes that impose requirements, for example, on the marketing and inspection of poultry that are comparable to those to which red meat is subject.[13]

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[12] *See* Food & Drug Admin., Ctr. for Food Safety and Applied Nutrition, Office of Premarket Approval [subsequently renamed Office of Food Additive Safety], *Antimicrobial Food Additives-Guidance*, at para. 7, (July 1999), *at* http://www.cfsan.fda.gov/~dms/opa-antg.html (last visited Aug. 5, 2002).

[13] *Compare* Poultry Products Inspection Act, 21 U.S.C. § § 451-471 *with* Federal Meat Inspection Act, 21 U.S.C. § § 601-695; *see also* 21 U.S.C. § 1626 (regarding marketing of agricultural products, including both red meat and poultry).

The poultry exemption should also be of concern to the sponsors of labeling. If, from their standpoint, the purpose of the provision is to inform consumers, then consumers will not be informed about the origins of their poultry under this statute. While consumers will see "signs, placards, and labels" in a retail supermarket display case informing them of the origin of red meat, they will see no labeling in the poultry section. Since per capita U.S. poultry consumption exceeds per capita beef consumption,[14] the exemption means that nearly half the meat consumed in the United States will not bear the labeling that the provision's sponsors deem so critical to the consumer's "right to know."

Moreover, the poultry exemption directly undermines the theory that the labeling provision of the Act was drafted to treat domestic and imported product alike. MLA believes that the poultry exemption is another piece of evidence demonstrating that the real purpose of the labeling provision is to single out red meat, significant amounts of which are imported, for the imposition of new regulatory burdens. Such burdens will not similarly affect poultry, which is generally not imported. In fact, according to news reports on the congressional mark-up session in which the labeling provision was adopted, "[p]oultry was excluded because [Senate Agriculture] [C]ommittee [C]hairman Tom Harkin (D., Iowa) and others noted it was a major export and seldom imported."[15] The very act of omission of a type of meat that is not imported, contrasted with the affirmative inclusion of types of meat that are imported in significant quantities, sends a loud and clear signal that imports are the target.

The exclusion was no doubt welcome news to the U.S. poultry industry, which now will not have to incur the compliance costs facing the red meat industry. In view of the $2 billion cost attributed to labeling for those who are affected by the Act and regulations, the exclusion of poultry from the labeling regime is, in effect, a $2 billion benefit for the poultry industry. As red meat becomes more expensive because of labeling, undoubtedly some consumers will choose poultry instead -- not because they really prefer it, but because they are forced to by government action. This is clearly unfair to both consumers and the meat industry, which already is in relatively poor financial condition because of current drought conditions in U.S.-beef-producing areas.

MLA understands that, because the plain language of the statute excludes poultry, USDA is not in a position to include poultry in the mandatory regulations on its own initiative. Rather, the omission of poultry is another reason to support repeal of this provision of the Act. The exemption of poultry demonstrates why the labeling provision is unwise policy from a U.S. domestic standpoint. The Act and the regulations are also bad policy because their

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[14] U.S. Dep't of Agric., Econ. Research Serv., *Livestock, Dairy and Poultry Outlook* (Dec. 2002), at 16 (reporting per capita consumption in 2002 of 67.5 pounds of beef, 97.6 pounds of broilers and turkey, and a total of 219.6 pounds of total red meat and poultry consumption).

[15] Sally Schuff, *Target Prices Focus of Senate Committee Bill*, Feedstuffs, Nov. 19, 2001, at 1. *See also*, Jerry Hagstrom, *Ag Committee Oks Farm Bill; Campaign Under Way to Bring Bill Up by Month's End*, Grand Forks Herald, Nov. 19, 2001, at A9 (noting that "the measure exempts poultry, which the United States imports only in tiny quantities"); U.S. Dep't of Agric., Econ. Research Serv., *Briefing Room, Poultry and Eggs: Trade, at* http://www.ers.usda.gov/Briefing/Poultry/trade.htm (updated Sept. 12, 2002) (stating, "[t]he United States imports only small amounts of broiler products . . . . less than 1 percent of domestic production").

implementation would disrupt the domestic market by interfering with existing marketing efficiencies, raising the price of certain muscle cuts and increasing costs for consumers.

V. Country of Origin Labeling is Unwise Policy from a U.S. Domestic Perspective

The background we have provided clearly demonstrates that maximizing the utilization of domestic 50's by blending it with Australian 90's allocates domestic and imported supplies to their optimal uses. If the Act and the regulations have the effect of discouraging the use of imported meat, there will not be enough beef 90's from domestic sources to meet existing demand. MLA believes that one possible result of such a development will be for processors and retailers to turn to domestic beef from the next available source in the meat production chain -- lean muscle cuts. Such muscle cuts would be ground for blending with the domestic 50's to achieve the desired lean points for ground beef for retail sale.

This development would necessarily have the effect of increasing demand for and raising the price of these lean muscle cuts. Using lean muscle cuts -- even less expensive ones -- is inherently more expensive than utilizing the trimmings that are a product of preparing muscle cuts for sale. If muscle cuts are diverted to hamburger, existing efficiencies would be lost and the impact of this loss would be felt all along the chain, as users of lower cost muscle cuts turn to the next-higher-cost cut to fill the gap created by decreased availability of the lower-cost cut. This has the potential of disrupting markets throughout the entire chain of products.

Some U.S. cattle ranchers may, over the long-term, increase production to accommodate the increased demand for muscle cuts to be diverted to the grinding market. However, MLA believes it unlikely that U.S. producers would alter their production systems to produce hamburger meat exclusively. Therefore, if the Act and regulations discourage the use of imported manufacturing beef and domestic producers do not compensate by producing more muscle cuts for grinding, the inevitable result will be more expensive ground beef. Consumers, particularly in lower income households, will pay the price for such a disruption of the U.S. market.

As ground beef becomes more expensive, the ability of lower income consumers to afford it will decline. Certain muscle cuts that once were relatively less expensive will also be beyond the reach of lower income consumers as such cuts are diverted to replace imported manufacturing beef in the production of ground beef. Ultimately, these consumers may have to go without beef altogether, or consume substantially less of it.

One of the major beneficiaries of this change will be -- once again -- the poultry industry, as consumers buy less beef and more chicken. This unanticipated benefit to the poultry industry is apart from the major benefit already provided to the industry by its exemption from the labeling regime altogether, as discussed above. It will further disrupt U.S. markets by unfairly inserting the government on the side of poultry in the ongoing competition for consumers between red meats and poultry.

MLA believes that the aforementioned disruptions to the domestic markets and U.S. consumers are sufficient reasons to oppose country-of-origin labeling. However, labeling also

raises serious questions about trade policy and whether implementing a labeling scheme will prevent the United States from complying with it WTO obligations.

VI. The Discriminatory Nature of the Statute and the Mandatory Regulations Would Violate U.S. Obligations as a Member of the WTO

A. The Statute

MLA believes a strong case can be made that the country of origin labeling provisions and regulations based on the voluntary guidelines would violate Article III:4 of GATT 1994. The first sentence of Article III:4 of GATT provides:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin *in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use* [emphasis added].

This sentence by its terms establishes three elements that must be met for a violation to exist: (1) the imported and domestic products must be "like products"; (2) the measure at issue must be a "law, regulation or requirement affecting internal sale, offering for sale, purchase, transportation or use; and (3) the treatment afforded to the imported product must be "less favourable" than that afforded to the domestic product.[16] Of these elements, there is no doubt that the country of origin requirements of the Act concern like products, since by their terms they apply to the same products, imported and domestic.

With respect to the question of "laws," there is equally no doubt that there is a law involved which affects the "internal sale" or offering for sale of meat. Although the labeling regime adopted pursuant to this law is currently governed only by voluntary guidelines, rather than by a "regulation," as stated in Article III:4, there will be mandatory regulations before the end of 2004. If the provisions of the voluntary guidelines are incorporated unchanged into the mandatory regulations, the regulations will raise the issue of whether the law affords "less favourable" treatment to imports than to domestic products.

Article III:4 has long been recognized as being the broadest of the provisions set forth in Article III. The use of the terms "treatment . . . in respect of" laws and regulations has been held to encompass not only the government measures themselves, but also how the government measures are applied. The terms of Article III:4, in essence, encompass any governmental action that discriminates against imports after the merchandise has been imported. Thus, Article III:4 has been held to apply to governmental requirements for sign display,[17] domestic regulations

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[16] *Korea -- Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* AB - 2000 -8, WT/DS161/AB/R, Appellate Body, 11 Dec. 2000, para.133/

[17] L/411, SR.10/3. The regulation in this complaint was a law in the State of Hawaii which required companies that sold foreign eggs to display a placard marked "[w]e sell foreign eggs."

requiring importers to purchase quantities of domestic commodities,[18] and enforcement of patent infringement rights by the government. The question is whether the governmental action "may lead to the application to imported products of treatment less favourable than that accorded to" products of national origin.[19] The goal of the provision is to provide "equal conditions of competition" once goods had been cleared through customs,[20] by preventing discriminatory "competitive opportunities created by the government in the market."[21] Where governmental action results in unfavorable treatment of imported products in the market, that action is inconsistent with Article III:4.

In addition, the use of the word "affecting" in Article III:4 means that it covers, in the words of one panel, "not only the laws and regulations which directly governed the conditions of sale or purchase but also any *laws or regulations which might adversely modify the conditions* of competition between the domestic and imported products on the internal market."[22] Thus, it is not necessary to show that a law itself provides more favorable treatment to the domestic than to the imported article. If the language of the law or regulation is such as to force more restrictions on imported than upon domestic merchandise, then a violation of Article III:4 can be found.

An example of a restriction that will weigh more heavily on imported product arises from the recordkeeping that will be required for ground beef if a processor uses beef from cattle associated with more than one country. Since the Act stipulates that meat can be of U.S. origin only if the animal was "born, raised and slaughtered" in the United States, the mere fact that an animal was slaughtered in the United States would not be sufficient to determine country of origin. The retailer would have to obtain and retain documents showing where the animal was raised as well as where it was born. Since the various stages of an animal's progress from birth to slaughter could occur at several different locations, and involve a separate business enterprise at each location, the recordkeeping requirements would be much greater and more difficult for beef originating from cattle that had been in more than one country than for U.S.-grown beef. Combining the requirements for labeling and recordkeeping governing beef imported from a single country and beef from cattle associated with more than one country will produce a vexing and expensive morass of bureaucratic rules that are clearly designed to discourage the use of imported product by everyone in the distribution chain.

In addition, it has been specifically held by at least one WTO panel that laws that impose greater labeling requirements, and laws that impose greater recordkeeping requirements, on imported products than on domestic products violate the provisions of Article III:4 of GATT 1994. In *Korea -- Measures Affecting Imports of Fresh, Chilled and Frozen Beef*,[23] the WTO panel considered Korean recordkeeping requirements that required sellers of imported beef to

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[18] *EEC – Measure on Animal Feed Proteins*, L/4599, 25S.49, 14 Mar. 1989.

[19] *United States – Section 337 of the Tariff Act of 1930*, L/6439, 37S 345, 387, 7 Nov. 1989, para. 5.13.

[20] *Italian Discrimination Against Imported Agricultural Machinery*, L/833, 7S/60, para. 13, 23 Oct. 1958.

[21] *United States – Measures Affecting Alcoholic and Malt Beverages*, DS23/R, 39S/206, 279, para. 5.31, 19 June, 1992.

[22] *Italian Discrimination Against Imported Agricultural Machinery*, L/833, 7S/60, 64, para. 12.

[23] WT/DS/161/R, 31 July 2000.

record and report all purchases and sales of imported beef, but not of domestic beef. The Korean scheme also required that labels be affixed to imported beef that were not required to be affixed to domestic beef.[24] Each one of these requirements -- the recordkeeping and the labeling requirements -- was separately found to be a violation of Article III:4.[25]

MLA has already described how the Act's exclusion of poultry, which is generally not imported, inherently disadvantages red meats, a large portion of which is imported. Our discussion has included the fact that imported meat, by its nature, is likely to pass through more handling stages on its way to retail point of sale and, as a result, will require more extensive tracking and recordkeeping than domestic product under the mandatory regulations. We have also cited the General Accounting Office's assessment of the complex audit trail that necessarily would burden ground beef blended from multiple sources, most of which are imported. We conclude, therefore, that since the Act necessarily imposes greater recordkeeping and labeling requirements upon imported meat than upon domestic meat, application of the precedent in *Korea -- Beef* directly compels the conclusion that such additional requirements for imported products violate Article III:4.

B. The Guidelines/Regulations

As previously noted, Article III:4 encompasses not only "laws" but also "regulations" and other governmental actions. Thus, even if the Act's language itself did not require discriminatory action, if the regulations effectuating that language imposed a discriminatory burden on imports, Article III:4 would be violated. Under regulations that would be based on the voluntary guidelines, anyone selling blended ground meat must not only determine the country of origin of each cut of meat used in the grinding, but also the precise weight of each ingredient from each country. The retailer must therefore determine and compare weights of each ingredient for each blending in order to assure that the labeling lists the country of origin in correct order. This is extremely burdensome, and is not required at all for U.S. origin merchandise.

Therefore, although USDA appears to believe in good faith that the guidelines and the anticipated mandatory regulations will maintain "equality" between domestic and imported product, MLA asserts that it simply cannot be so in actual practice. It is the very fact of importation of Australian beef for blending that triggers requirements both for segregating different sources, so that they can be listed by weight, and for "clear product tracking from the port of entry into the United States." Product of U.S. origin (*i.e.*, 100 percent U.S.-origin) will not have to be so segregated, nor will it have to be so extensively tracked if it is "born, raised, and slaughtered" in the United States (although such beef will require some sort of less onerous recordkeeping to prove a claim of U.S.-origin).

Furthermore, with respect to the issue of "mixed origin" meats, *i.e.*, meat derived from animals born in another country and shipped to the United States either for raising and slaughtering, or simply for slaughtering, the guidelines, and presumptively the regulations, would require the label to state "born in country X, raised and slaughtered in the United

[24] *Id.*, at paras. 220, 221.

[25] *Id.*, at paras. 692, 710.

States."[26] Thus, for meat from animals born outside the United States, the meat products must be "labeled to show the "processing steps that occurred in a foreign country prior to slaughter in the United States."[27] The same is not true for animals born, raised and slaughtered in the United States.

To sell meat as being of U.S. origin, it is necessary under the guidelines only to "identify the location of the growers and production facilities." In contrast, the records for imported meat must show the country of birth, the country of growth, and the country of slaughter, as well as providing "a clear product tracing from the port of entry into the United States."[28] Moreover, "when similar covered commodities may be present from more than one country or different production regimes, a verifiable segregation plan must be in place."

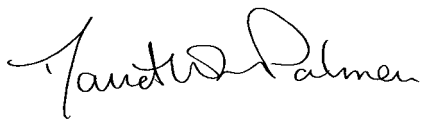
To state the animal's provenance for imported meat, retailers must assure meticulous recordkeeping from the time the animal is born until the time that it is slaughtered. Given the differences between the process of importing meat and the process of producing domestic meat, these reporting requirements for non-U.S. origin meat will necessarily be more stringent than those for U.S.-origin meat.

In sum, whether looking at the language of the Act itself or to the regulations interpreting the Act, it is clear that the Act is being and will be applied in such a way as to provide greater labeling and reporting burdens on meats containing imported ingredients -- in whole or in part -- than will apply to "exclusively" U.S.-origin meat. In this respect, the law and the regulations demonstrate probable violations of Article III:4.

VII. Conclusion

In view of the potentially very significant and adverse effects that labeling will have on international trade policy, its economic effects on U.S. businesses, and its disruption of market mechanisms and consumer choice, we strongly urge the repeal of the Act. Short of that, we urge USDA to make every effort to avoid guidelines and regulations that would lead directly to these effects, to the extent that such avoidance is possible under the provisions of the Act as it now exists.

Sincerely,



David Palmer
Regional Manager -- The Americas

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[26] *Id.*

[27] 67 *Fed. Reg.* at 63,373.

[28] 67 *Fed. Reg.* at 63,375.